No. 2584

United States
Circuit Court of Appeals
For the Ninth Circuit.

POLSON LOGGING COMPANY, a Corporation,
Plaintiff in Error,

vs.

GUSTAVE H. NEUMEYER and ABRHAM J. DIMOND, Copartners Doing Business Under the Name and Style of NEUMEYER & DIMOND,
Defendants in Error.

Brief of Plaintiff in Error.

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STATEMENT OF THE CASE.

Neumeyer & Dimond, co-partners, brought this action against Polson Logging Company, a corporation, to recover the sum of $3,895.39, alleged to be due them on a written order for goods, wares and merchandise, a copy of said order being attached to the complaint as Exhibit "A". (R. p. 3). Exhibit "A" is an order for a large amount of steel of dif-

ferent sizes and dimensions, and defendants in error alleged in Paragraph 4 of the complaint, that they delivered to plaintiff in error the goods, wares and merchandise called for by, and in accordance with said order, at Hoquiam, Washington. (R. p. 4).

The answer is a general denial and also sets up an affirmative defense of fraud in the procurement of said order, and lack of authority on the part of J. C. Shaw to sign said order on behalf of plaintiff in error. (R. p. 6). The reply is a general denial of the affirmative defense set up in the answer. (R. p. 10).

The cause was duly tried before a jury, on the 24th, 25th and 26th days of September, 1914. At the close of the testimony of defendants in error, plaintiff in error challenged the sufficiency thereof, which motion was denied and exception duly taken and allowed. (R. p. 28). At the close of all the testimony in the case, plaintiff in error moved the court to instruct the jury to bring in a verdict for the plaintiff in error, upon the ground that defendants in error had not proved that they delivered to the said plaintiff in error, goods, wares and merchandise of the kind, character and description called for by the contract sued on, and in accordance with said contract. This motion was also denied and exception duly taken and allowed. (R. p. 70). The court thereupon instructed the jury, and the jury later returned a verdict against the plaintiff in error in the amount sued for, plus interest, and judgment was thereafter

and to-wit: on the 9th day of October, 1914, entered in favor of defendants in error. (R. p. 11).

On the 30th day of September, 1914, plaintiff in error duly filed and served a motion for judgment notwithstanding the verdict, and thereafter and in due course, plaintiff in error filed and served a motion for a new trial. (R. p. 13). On the 24th day of November, 1914, and in term time, the District Court, on the application of plaintiff in error, did, for good cause shown, extend the time to December 20th, 1914, for plaintiff in error to draw up, serve and file its bill of exceptions. (R. p. 15).

On the 30th day of November, 1914, plaintiff in error's motions for a new trial and for judgment notwithstanding the verdict were duly presented to the court and argued, which motions were by the court overruled and exceptions duly taken and allowed. (R. p. 15).

Plaintiff in error's proposed bill of exceptions was duly certified by the court on the 19th day of December, 1914, and thereafter a writ of error was duly prosecuted to this court. (R. p. 92, 94).

For the purpose of facilitating and abbreviating the record on appeal herein, it was stipulated between the parties that plaintiff in error, in the prosecution of its appeal to this court, would admit that there was sufficient testimony to go to the jury, and that the jury was justified in finding that the the order sued on in the action was obtained from

plaintiff in error in good faith, and that J. C. Shaw, who signed the order on behalf of the Polson Logging Company, had authority to sign said order, and that the claim or defense of fraud alleged by the said plaintiff in error in its affirmative defense, was not proven, and that the plaintiff in error would not urge on the appeal of this cause, any exception or objection to the sufficiency of the evidence or the verdict of the jury on the points mentioned.

ASSIGNMENTS OF ERROR.

I.

The District Court of the United States for the Western District of Washington, Southern Division, erred in overruling and refusing to grant defendant's motion for a non-suit, at the close of the plaintiffs' testimony, and in refusing to instruct the jury to bring in a verdict for the said defendant, after defendant had challenged the sufficiency of plaintiffs' testimony at the close thereof. Said motion should have been granted for the reason that the plaintiffs failed to prove that they delivered or tendered delivery to the said defendant, bars of steel of the kind character and description called for by the contract and in accordance therewith.

II.

That the court erred in overruling the defendant's motion for a directed verdict, at the close of all the testimony, for the reason that the evidence in the case conclusively shows that the plaintiffs did

not deliver or tender delivery to the defendant, personal property of the kind, character and description called for by the contract sued on and in accordance with said contract.

III.

That the court erred in refusing to give to the jury Instruction No. 3, duly requested by said defendant on the trial of said cause, which instruction reads as follows:

"INSTRUCTION NO. 3.

If you find that the defendant ordered the goods, wares and merchandise sued on and gave the order as contended for by the plaintiffs, and said order was not procured through fraud, as alleged by the defendant, and you find that the person who signed said order on behalf of the defendant company, to-wit: J. C. Shaw, had authority or apparent authority as will hereafter be explained, to order said goods on behalf of the defendant company, and if you find further that the plaintiffs delivered or tendered a delivery of the steel called for by the contract, to the defendant at Hoquiam, Washington, and the defendant wrongfully refused payment therefor, then you will find for the plaintiffs for the amount agreed to be paid for said goods, as provided for in said order, with interest. In determining the fact, whether or not the plaintiffs have complied with their contract in delivering or tendering delivery to the defendant of the steel ordered, if you find it was ordered, I instruct you that to constitute a good delivery in law, so as to make the defendant liable for said steel, the same must correspond in quantity and in kind and description with that named in the

order. The defendant was not obliged to accept any less or any greater number of bars of steel than ordered, nor was the defendant obliged to accept bars of steel of any less or greater length than ordered, and if the steel, or any part thereof, delivered or tendered to the said defendant, did not comply with the contract in this, to-wit: that said bars of steel were less or greater in number than shown on the order sued on, or said bars of steel, or some thereof, were not of the length specified in the order, but were of a greater or less length, then the defendant had a right to reject the whole of said order so delivered or tendered, because the failure of the seller, the plaintiffs in this case, to deliver the quantity specified, or to deliver steel of the length specified, constituted a total breach of the contract. The plaintiffs in this case were bound to tender or deliver the number of bars of steel called for, and were bound to tender bars of steel of the length called for, and if you find that the plaintiffs did not deliver or tender delivery of the number of bars of steel specified in the order, or the bars delivered or tendered were of a greater or less length than twenty feet cut in two, then you will find your verdict for the defendant."

IV.

That the court erred in refusing to give to the jury Instruction No. 6, duly requested by said defendant on the trial of said cause, which instruction reads as follows:

"INSTRUCTION NO. 6.

If you find that the defendant ordered the goods, wares and merchandise sued on and gave the order as contended for by the plaintiffs, and

said order was not procured through fraud, as alleged by the defendant, and you find that the person who signed said order on behalf of the defendant company, to-wit: J. C. Shaw, had authority or apparent authority, as will hereafter be explained, to order said goods on behalf of the defendant company, and if you find further that the plaintiff delivered or tendered a delivery of the steel called for by the contract, to the defendant at Hoquiam, Washington, and the defendant wrongfully refused payment therefor, then you will find for the plaintiffs for the amount agreed to be paid for said goods, as provided for in said order, with interest. In determining the fact, whether or not the plaintiffs have complied with their contract in delivering or tendering delivery to the defendant of the steel ordered, if you find it was ordered, I instruct you that to constitute a good delivery in law, so as to pass the title to the steel to the defendant and to make the defendant liable for said steel, the same must strictly correspond in quantity and in kind and description with that named in the order. The defendant was not obliged to accept any less or any greater number of bars of steel than ordered, nor was the defendant obliged to accept bars of steel of any less or greater length than ordered, and if the steel delivered or tendered to the said defendant, did not comply with the contract in this: that said bars of steel were less or greater in number than shown on the order sued on, or said bars of steel were not of the length specified in the order, but were of a greater or less length, then the defendant had a right to reject the whole of said order so delivered or tendered, because the failure of the seller, the plaintiffs in this case, to deliver the quantity specified, or to deliver steel of the length specified, constituted a total breach of the contract. The plaintiffs in this case were bound to tender or deliver the exact quantity of bars of

steel called for—neither more nor less—and were bound to tender bars of steel of the length called for—neither more nor less—and if you find that the plaintiffs did not deliver or tender delivery of the exact number of bars of steel specified in the order, or the bars delivered or tendered were of a greater or less length than twenty feet cut in two, then you will find your verdict for the defendant."

V.

That the court erred in denying defendant's motion for judgment notwithstanding the verdict.

VI.

That the court erred in denying defendant's motion for a new trial, for the reason that Instructions Nos. 3 and 6 should have been given by the court to the jury, and because the testimony of the plaintiffs with reference to the completion of the contract on their part, was not sufficient to justify the verdict and the judgment.

ARGUMENT.

I.

THE COURT ERRED IN REFUSING TO DIRECT THE JURY TO RETURN A VERDICT IN FAVOR OF PLAINTIFF IN ERROR, AT THE CLOSE OF ALL THE TESTIMONY IN THE CASE, AND IN ENTERING JUDGMENT IN FAVOR OF DEFENDANTS IN ERROR.

It is elementary that the seller in an action for the price of goods sold, must prove a performance on his part, of the contract sued on.

In this case defendants in error's action is based on an executed contract, and it was necessary, therefore, to allege in the complaint, and to prove, by a preponderance of the evidence, that they delivered or tendered a delivery to plaintiff in error of goods of the kind, character and description specified in the contract.

In 35 CYC, page 564, the rule is laid down as follows:

> "The burden of proof is upon the plaintiff to prove the contract, terms thereof, the performance of the contract on his part, or a waiver of its provisions by the buyer, and also that the goods delivered or tendered complied with the contract."

In McCall & Co. v. Jacobson, 139 Mich., 455; 102 N. W. p. 969, the court said:

> "It was an essential part of plaintiff's case to prove that the goods tendered complied with the contract."

In Price et al v. Wiesner, (Kan. 1910), 111 Pac., p. 438, the court sustained a demurrer to the complaint, and said:

> "If the instrument had constituted a binding contract, the plaintiffs, in order to recover, would have been obliged to offer some proof to show that the goods were delivered in accordance with the contract. There was no offer of any evidence, except the alleged contract itself. Until delivery the seller can maintain no action for the purchase price, except in those cases where the contract contemplates that he shall retain possession."
> See also:

Bray Clothing Co. v. McKinney (Ark. 1909), 118 S. W., p. 406.

24 A. & E. Enc. of Law, p. 1062.

Tiedeman on Sales, Sec. 68.

2 Mechem on Sales, 746.

J. B. Inderrieden Co. v. Johnson Co. (Minn. 1910), 128 N. W., 570.

35 Cyc., 531-550.

Pontiac Shoe Co. v. Hamilton, 44 S. W. 405.

The order in this case specifies that the bars of steel, with the exception of the last item on the order, should be twenty feet long, cut in two. (R. p. 115). In other words, each bar of steel should be twenty feet long, cut in two, thus making two bars of 10 feet each. There can be no dispute as to the construction of this order.

Mr. Sulcove, the agent who obtained the order, testified that he obtained the information with reference to the number of bars, the sizes and lengths thereof, etc., from the camp. He testified:

"Q. All of those bars were to be 20 feet long, cut in two?

A. Yes, sir.

Q. And you got your specifications with reference to the length from Mr. Kline and Mr. Brown?

A. Yes, sir.

Q. The last two items on the order were to be eight feet each?

A. Yes, sir.

Q. Now, did they specify also the different kinds of steel wanted, so many bars of Swivel Steel, Choker, Clevis, Swivel Eye, Choker Hook and Piston Rod Steel?

A. Yes, I marked it exactly as they gave it to me.

Q. In fact, they specified feet, description, number of sizes, length of the bars, and the kind, whether Piston Rod or Draw Head Steel, that they wanted and that they said that the camp needed?

A. Yes, sir."

(R. p. 20).

The only person who testified on behalf of defendants in error, with reference to a delivery of the goods called for by the contract, was Mr. W. F. Neumeyer, who did not become a member of the firm until the first of the year following. He testified that at the time the order was taken by Mr. Sulcove, witness was traveling for Neumeyer & Dimond in the capacity of a salesman (R. p. 25); that the order first came to his attention when Mr. Sulcove came back to Portland, in the year 1912, and witness mailed this order, together with other orders, to the office of the firm in New York City. About a year later witness went to Hoquiam and called upon plaintiff in error,

for the purpose of adjusting the matter, but no adjustment was reached. His entire testimony with reference to the performance by his firm of this contract, is as follows:

Direct Examination.

"Q. Did you see this steel when you were down there?

(Referring to the time when witness was in Hoquiam a year after the order was taken).

A. Yes, I went to the Freight Depot and talked to the Freight Agent and I saw the bills of lading and I saw the steel.

Q. And that steel was shipped in accordance with this order in Court?

A. Exactly."

(R. p. 22).

On cross-examination his entire testimony on this point is as follows:

"Q. Now the only time you saw this steel was at Hoquiam, Mr. Neumeyer?

A. At Hoquiam, when I wanted to be sure that the steel was altogether, and besides I wanted to talk to the Freight Agent—

Q. Just answer the question. The only time you saw the steel was in the warehouse and freight depot combined, at Hoquiam?

A. Yes, sir.

Q. It was there in the corner of the warehouse all piled up?

A. Yes, sir.

Q. You did not make any examination of the steel in any way; just looked at it and saw it was still there and Neumeyer & Dimond steel and that is all you concerned yourself about?

A. Yes, sir.

Q. Your name is William E. Neumeyer?

A. Yes, sir.

Q. Are you a member of the firm of Gustave H. Neumeyer & Abraham J. Dimond?

A. Yes, since 1913, I am a member of that firm.

Q. You were not a member of that firm when this order was given?

A. Not yet.

Q. Were you connected with this business at that time or not?

A. No, sir, I was traveling just the same as Mr. Sulcove was.

Q. You were traveling in the capacity of salesman?

A. Yes.

Q. And you continued to travel in the capacity of salesman until January 1, 1913; is that correct?

A. I became a partner of the firm, but I am still traveling for the firm, just the same as I did before.

Q. So you have nothing to do with the office end of it?

A. Not much.

Q. And your orders are sent in just the same as everybody else's orders are sent in?

A. Yes, sir.

Q. And you have nothing to do with the filling or shipping of orders?

A. No, sir.''

(R. p. 24, 25).

Witness also testified that this steel was manufactured by Henry Diston & Sons at Tacony, Pennsylvania, and was shipped from that point to plaintiff in error at Hoquiam. (R. p. 24).

It is well to note here, that the order is dated September 11th, 1912, and the same arrived in Hoquiam about the middle of March, 1913. It is very evident, therefore, that when Mr. Neumeyer testified that the steel had been shipped exactly in accordance with the order, he was testifying, not from personal knowledge, but merely presumed that his firm had filled the order as given. A year later he saw

a pile of steel in the Northern Pacific Warehouse at Hoquiam, but he made no examination of the same to find out what was shipped, but merely, as he expressed it, saw a pile of steel in one corner of the warehouse. (R. p. 24).

If the bills of lading and the invoice will be examined (See Exhibits A, F, 11, 12; R. p. 131, 166, 125, 127) it will be noted that the bills of lading, and the invoice, only show the number of bars shipped and the weights, but are silent as to the length of the bars.

It was upon this testimony that plaintiff in error challenged the sufficiency of the evidence, at the close of the testimony of defendants in error. If this testimony was sufficient to make a **prima facie** case in favor of defendants in error, we believe that the same was overcome by the specific testimony of the witnesses for plaintiff in error, which testimony is not disputed or contradicted in any way, shape or manner.

Mr. Flurshuts, an experienced iron and steel man connected with Foster & Co. of Hoquiam, called as a witness by plaintiff in error, testified that about a week or ten days before the trial, he examined the Neumeyer & Dimond steel in the Hoquiam warehouse, and measured and weighed each bar. (R. p. 31). As Mr. Flurshuts measured and weighed each bar, he jotted the same down, and the result of his labors is shown in plaintiff in error's Exhibit "C". (R. p. 132). Later, Mr. Mills, an experienced iron

and steel man connected with Hunt & Mottet of Tacoma (R. p. 58) and Mr. Flurshuts together measured each bar of steel, and their joint work confirmed the earlier work of Mr. Flurshuts, and their measurements were offered and admitted in evidence as plaintiff in error's Exhibits "D" and "H". (R. p. 42, 60, 150-169). By examining these exhibits, it will be noticed that the length of the bars shipped by defendants in error, do not even substantially comply with the terms of the order.

Another witness, Mr. Gillespie, using the data secured by Mr. Flurshuts and Mr. Mills, made a summary, showing the number of feet of each kind of steel ordered, the number of feet of each kind of steel actually shipped, the difference between the length ordered and shipped, and the surplus weight of such difference in length determined from the defendants in error's own weights (R. p. 53). This summary or computation was offered and admitted in evidence as plaintiff in error's Exhibit "G". (R. p. 168). We invite a careful examination of this summary.

If any explanation of the summary is necessary, we beg to refer to the first item thereof as noted, "1½x2½ Swivel Steel," which is the first item of the order sued on. Three bars of this steel were ordered, which at 20 feet long, makes 60 feet of this kind of steel ordered. There actually was shipped by defendants in error, the required number of bars, but of a total length of 77 feet 2¼ inches, making an excess length of 17 feet 2¼ inches. Now referring

to the invoice sent by defendants in error to plaintiff in error (R. p. 166), it will be noted that the total number of bars of the 1½x2½ Swivel Steel shipped, having a length, as shown above, of 77 feet 2¼ inches, had a certain weight. By simple method of computation, therefore, it is determined that the excess length of 17 feet 2¼ inches, had a weight of 202 pounds, which is the surplus weight shipped. By referring to the work of Mr. Flurshuts and Mr. Mills, offered in evidence as plaintiff in error's Exhibits "C", "D" and "H", the exact length of each of the six bars of 1½x2½ (or three bars cut in two) Swivel Steel, will be ascertained, and it will be shown that each of said bars was necessarily more than 10 feet long, in order to make up the difference of 17 feet 2¼ inches. The summary, being Exhibit "G", takes up each item of the order sued on, and as the same speaks for itself, it will not be necessary to further refer to the same, except as to the general result. According to the summary, it will be noted that none of the bars comply in matter of length, with the terms of the order. Altogether, defendants in error shipped 523 feet of steel more than was ordered, or a total weight of 2,709 pounds, which at 12½ cents a pound, makes $338.62. This amount represents an amount of steel shipped in excess of that ordered, and for which judgment has been entered against the plaintiff in error. On five different specifications the length shipped was less than the amount ordered, making a total short weight of 603 pounds. This is also shown on the summary, but we have left out the

2,642 pounds shown as short weight shipped, and which represents the twelve bars of steel which were shipped from Seattle at a later shipment. (R. p. 67, 127).

It developed on the trial, that there were two different shipments of steel, and we will concede, for the sake of the argument, that defendants in error have actually shipped the number of bars ordered, and will confine our argument entirely to the difference in the length of the bars and in the surplus weight.

It was upon this testimony that plaintiff in error at the close of all the testimony in the case, moved the court to direct the jury to render a verdict in its favor, upon the ground that the evidence conclusively showed that defendants in error had not complied with their contract. (R. p. 70).

In this connection two points present themselves for discussion: First. Should the court have granted the motion instructing the jury to find a verdict in favor of plaintiff in error? Second. Have defendants in error complied with their contract?

The second point is so connected with the first point, that in the discussion of the first point it will be assumed that if the testimony of plaintiff in error, on the question of the performance of the contract, must be taken as the testimony in the case, then defendants in error have not complied with their contract. Having this in mind, we refer to the rule

which should govern the action of the trial court in allowing or refusing the motion to direct the jury to give a verdict one way or another.

It is thus stated in Commissioners v. Clark, 94 U. S., p. 278-284:

> "Decided cases may be found where it is held that if there is a scintilla of evidence in support of a case the judge is bound to leave it to the jury; but the more modern decisions have established a more reasonable rule; to-wit: that before the cause is left to the jury, there is or may be in every case, a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."

Ozanne v. Ill. Central R. Co., 151 Fed. 900-903.

Boudrot v. Cochrane Chemical Co., 110 Fed. 919-922.

Strauss v. American Chewing Gum Co., 114 S. W. 73-74.

Gipe v. Pittsburgh R. Co., 82 N. E. 471-474.

Coughran v. Bigelow, 164 U. S. 301; 41 Law Ed. 443-446.

Patton v. Tex. & P. R. Co., 179 U. S. 659-661; 45 Law Ed. 361-363.

Long v. McCabe & Hamilton, 52 Wash., 422-432.

In Coughran v. Bigelow, supra, the Supreme Court of the United States used the following language:

> "The foundation for those rulings was not in the constitutional right of the trial by jury, for it has long been the doctrine of this court, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the **onus** of proof is imposed, and that, if the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly, and if the jury disregards such instructions, to set aside the the verdict."

The Supreme Court of the State of Washington, in the case of Long v. McCabe & Hamilton, supra, said:

> "Assuming, then, that the testimony was sufficient to cast this burden on appellant, the testimony adduced and offered at the trial shows that it amply sustained the charge put upon it by the trial court. Where the burden shifts, the **prima facie** showing which a plaintiff is bound to make must be measured by the evidence of the defendant rather than by any fixed rule of law.
>
> > 'When the party who has the affirmative of an issue has succeeded in making out a **prima facie** case he has relieved himself for the time being of the necessity of producing evidence; for, unless the adverse party now goes forward with evidence, this **prima facie** case naturally results in an established case upon all the evidence. In other words, this duty of introduc-

ing evidence is shifted by a **prima facie** case in the first instance, and back again by counter evidence which meets and destroys the **prima facie** case, and so on. And this is what the authorities mean when they say that the burden of proof shifts during the progress of a trial.'

5 Ency. Plead. & Prac., p. 39.

In other words, as against a motion for a judgment at the close of plaintiff's case and renewed at the close of all the evidence, a **prima facie** showing is to be determined as a matter of law by the court in the light of the explanations made by the defendant. The duty of measuring the evidence, not as to its weight but its legal effect, is put upon the court. What may have been evidence **prima facie**, may not be so when rebutted by other evidence. The negative testimony must give way to the positive evidence."

We submit, that tested by this rule, there is no evidence in the case upon which the jury could properly find a verdict for defendants in error.

The conflict in the testimony of Mr. Neumeyer, for defendants in error, and of Mr. Flurshuts, Mr. Mills and Mr. Gillespie, for plaintiff in error, is apparent rather than real. Neumeyer did not testify from personal knowledge, whereas the witnesses for plaintiff in error did. Reasonable minds could not possibly differ on the question of the length of the bars shipped by defendants in error.

As said in the case of Weir v. Seattle Electric Co., 41 Wash., 657; 84 Pac., 597:

> "Cases may arise in which a plaintiff's **prima facie** case is so fully explained and controverted as to leave no substantial conflict in the testimony."

Commenting upon this case the Supreme Court of the State of Washington in the case of Scarpelli v. Washington Water Power Co., 63 Wash., 18-22; 114 Pac., 870, said:

> "In such cases it is the duty of the court to take the case away from the jury, either upon a challenge to the sufficiency of the testimony, or on a motion for judgment notwithstanding the verdict."

We believe it requires no further argument to convince this court that the testimony of plaintiff in error on the question of the length of the bars actually shipped and of the surplus weight, must be taken as the evidence in the case. The court, therefore, should have instructed the jury to bring in a verdict for plaintiff in error.

The next proposition to discuss is, whether or not, conceding that the testimony of the plaintiff in error on this point is the undisputed testimony in the case, the defendants in error have, as a matter of law, completed their contract. In this connection the rule is laid down in 35 CYC, subject "SALES," page 202, as follows:

> "Generally a specification of quantity in a contract of sale will be regarded as material. The full quantity contracted for must be delivered at the time and place specified to constitute a suf-

ficient delivery and the buyer is in general not obliged to accept or pay for a less quantity, the failure of the seller to deliver the quantity specified constituting a total breach of the contract."

A large number of cases are cited in the notes to said quotation, some of which will be hereafter referred to.

Again on page 204 of the same volume, it is said:

"So too, a delivery in excess of the quantity contracted for is not a proper delivery and although the buyer may, if he so elects, retain the amount designated by the contract and reject the excess, no obligation is imposed on him to select the proper quantity out of the excessive quantity delivered, but he may reject the whole, especially when the selection of the proper quantity would be troublesome and laborious or the buyer did not have the privilege of separating or receiving less than the whole quantity shipped."

See cases cited in the notes to said quotation.

Again on page 206, it is said:

"If the quantity of goods sold is specified in the contract, such specification will be regarded as determinative and is not rendered indefinite because qualified by the words 'about' or 'more or less.' The use of such words merely provides for such slight variations as are necessary due to accident or to the inherent difficulty of making delivery of the exact quantity sold."

Citing cases.

It will be noted in this connection, that the specification with reference to the length of bars, does not allow or permit of any variation, no words such as

"about" or "more or less" being used. The order therefore must be read as if after each specification of the size and kind of steel, the words "Bars to be 20 feet long," were inserted.

In the Am. & Eng, Enc. of Law, 2d Ed., Vol. 24, page 1077, subject "SALES," the rule is laid down as follows:

> "The seller is bound to tender or deliver the exact quantity called for, neither more nor less, unless the contract is separable, in which case a tender or delivery of the exact quantity called for by some severable part of the contract is **pro tanto** sufficient and must be accepted. He has not the right to send the goods sold mixed with other goods and to call upon the buyer to accept more than he bargained for or to select the quantity bargained for out of a larger quantity delivered. If the goods exceed or fall short of the quantity agreed upon, the buyer, as a general rule, may refuse the whole of them * * * * * The quantity to be delivered is sometimes stated in the contract with the addition of such words as 'about,' 'more or less,' etc. These are considered words of estimate and expectation only and indicate a purpose on the part of the seller not to bind himself to any precise quantity, but merely to keep reasonably close to the amount named. For where the terms of the contract do not mention the exact quantity and admit of some latitude of construction, the courts are inclined to adopt a liberal construction in favor of the seller and hold a substantial compliance on his part to be sufficient."

In passing it will be noted that the contract in question does not admit of any latitude of construc-

tion but the seller bound himself by his acceptance of the contract, to send bars 20 feet long cut in two.

In Benjamin on Sales, 4th Am. Ed., p. 800, the learned writer lays down the following rule:

> "The vendor does not comply with his contract by the tender or delivery of either more or less than the exact quantity contracted for, or by sending the goods sold mixed with other goods. As a general rule, the buyer is entitled to refuse the whole of the goods tendered if they exceed the quantity agreed, and the vendor has no right to insist upon the buyer's acceptance of all, or upon the buyer's selecting out of a larger quantity delivered."

The author cites and comments upon, among other cases, the case of DIXON vs. FLETCHER, an old English case in which the declaration alleged an order by defendant for the purchase on his account of 200 bales of cotton and a shipment to him of 206 bales, and the defendant's refusal to receive said cotton or any part thereof. The court allowed the plaintiff to amend his declaration, holding it to be insufficient for want of averment that the plaintiffs were ready and willing to deliver the 200 bales only.

Other cases of similar import are mentioned by the author.

Again the author says in Section 690:

> "If on the other hand, the delivery is of a quantity less than that sold, it may be refused by the purchaser; and if the contract be for a specified quantity to be delivered in parcels

from time to time, the purchaser may return the parcels first received if the latter deliveries be not made, for the contract is not performed by the vendor's delivery of less than the whole quantity sold."

Again in Section 691 the author says:

"The quantity to be delivered is, however, sometimes stated in the contract with the addition of words such as 'about' or 'more or less,' which shows that the quantity is not restricted to the exact number or amount specified, but that the vendor is to be allowed a certain moderate and reasonable latitude in the performance."

The author then refers to the rule laid down by the U. S. Supreme Court in the case of Brawley vs. U. S., 6 Otto, 168, for the guidance of the courts in the construction of similar contracts.

"First: Where the goods are identified by reference to independent circumstances such as an entire lot deposed in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of 'about' or 'more or less,' or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it.

Secondly: Where no such independent circumstances are referred to and the engagement is to furnish goods to a certain amount, the

quantity specified is material and governs the contract. The addition of the qualifying words 'about', 'more or less' and the like, in such cases is only for the purpose of providing against accidental variations arising from **slight and unimportant excesses or deficiencies in number, measure or weight.**

Thirdly: In the last case, however, if the qualifying words 'about', 'more or less' and the like, are supplemented by other stipulations or conditions which give them a broader scope or more extensive significancy, then the contract is to be governed by such added stipulations or conditions."

Again, under the subject "CONDITIONS," in Section 600 of the same volume, the learned author says:

"When the vendor sells an article by a particular description, it is a condition precedent to his right of action that the thing which he offers to deliver, or has delivered, should answer the description."

The writer then goes on to say that some courts have regarded the breach on the part of the seller to comply with the specific description of an article ordered in the contract, as a breach of warranty, but that such designation was erroneous, for as he says:

"It would be better to distinguish such cases as non-compliance with the contract which a party has engaged to fulfill. * * * * There can be no doubt of the correctness of the distinction here pointed out. If the sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability, and if this condition be not performed, the purchaser is entitled to reject the article."

In the case of J. A. Coats & Sons v. Huffine (Ind.) 41 N. E., p. 465, the appellant sued to recover the price of 5,000 patent needle cards at 3 cents per card, amounting to $150.00. The complaint was on an express contract, to which the defendant entered a general denial. It appeared that in response to a circular letter of plaintiff, enclosing a blank order, the defendant in writing ordered 5,000 patent needle cards, according to certain sizes, with his advertisement thereon, and the appellant shipped such goods on receipt of the order and mailed bill for the shipment to the defendant. The defendant, on receipt of the bill, wrote appellant, stating that someone must have made a mistake; that he intended to order, not 5,000 papers or cards, but 5,000 needles, and refused to accept the shipment, and suit was thereupon brought. After the first trial, the defendant paid the freight on the goods, took them to a private warehouse, for the sole purpose, as the jury found, of examining them to find whether the packages contained the full number of needle cards contained in the order, and it was found that the packages contained 46 cards less than 5,000. The plaintiff proved by different witnesses, that the exact number of cards ordered had been delivered to the Railroad Company.

The court said:

> "It is the contention of appellee's counsel that conceding that appellee contracted for the goods as claimed by the appellant, the contract was an entirety and that appellee was not bound

> to accept a smaller or other quantity of goods than that called for by the order, and that, if appellant relies upon the contract, it must prove that it performed the whole of it by shipping to the appellee the exact quantity ordered by him."

And citing,

Smith v. Lewis, 40 Ind,. 98.

Hausman v. Nye, 62 Ind., 485.

The court further found that there being conflicting testimony as to the performance of the contract, it was a question for the jury to decide, and that it was also a question for the jury to decide, whether or not the defendant had accepted the goods by paying the freight thereon and removing them to a warehouse, etc.

In the case of Brown vs. Norton, 2 N. Y. Supp., 869, the syllabus reads as follows:

> "Under a contract for the sale of 10,000 Blue Welsh Fire Brick, a tender of 9,986 of such brick, of which 100 are broken, does not render the purchaser who refuses to accept, liable for the price."

In Donnor vs. Thompson, 2 Hill, 137, it was held that a contract to deliver 250 barrels, is not fulfilled by delivering 260, and the vendee may refuse the whole on account of the excess.

In the case of Norrington v. Wright, 29 Law Ed., p. 366; also found in 115 U. S., p. 188, an order was given for 5,000 tons of old "T" Iron Rails for ship-

ment from an European port or ports, at the rate of about 1,000 tons per month, beginning February, 1880, but the whole contract to be shipped before August 1st, 1880, at $45 per ton. It appeared that the plaintiff shipped from various European ports, 400 tons by one vessel in February, 885 tons by two vessels in March, 1,571 tons by five vessels in April, 850 tons by three vessels in May, and 1,000 tons by two vessels in June, and 300 tons by one vessel in July. The February shipment was accepted and paid for, but on May 14th, about the time of the arrival of the March shipments the purchasers gave written notice that they would refuse to accept the shipments made in March and April, because not according to contract. The court said:

> "In the contracts of merchants time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods or of fulfilling contracts with third persons. A statement descriptive of the subject matter or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract."

Citing, among other cases:

Lowber v. Bangs, 17 Law Ed., 768.

Davidson v. Von Lingen, 113 U. S., p. 40; 28 Law Ed., p. 885.

The court found that the plaintiff had not complied with his contract with reference to the time and quantity of shipment and stated the rule which had theretofore been announced by the court in the case of Brawley v. U. S., 96 U. S., 168, 171, 172; 24 Law Ed., 622, 623, 624, which rule has been quoted above.

The court then said:

> "The seller is bound to deliver the quantity stipulated and has no right either to compel the buyer to accept a less quantity or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly the seller's failure to ship the required quantity in the first month, gives the buyer the same right to rescind the whole contract that it would have had if it had been agreed that all the goods should have been delivered at once."

The leading English case is probably Bowes v. Shand, which was finally determined by the House of Lords, and found in 2 Appeal Cases, 455, in which case contracts were made for the sale of 300 tons of Madras rice to be shipped at Madras or coast, during the months of March or April, 1874, per certain boat. It was held that the action could not be maintained because it had not been proved by the plaintiff, that the rice was put on board in March and April or in one of those two months. Lord Blackburn said:

> "If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties

bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is and probably equally good rice might have been shipped in February as was shipped in March, or equally as good rice might have been shipped in May as was shipped in April. But the parties have chosen for reasons best known to themselves, to say: 'We bargain to take rice shipped in this particular region, at that particular time, on board that particular ship,' and before the defendants can be compelled to take anything in fulfillment of that contract, it must be shown, not merely that it is equally good, but that it is the same article as they have bargained for, otherwise they are not bound to take it."

In the case of Pittsburgh Plate Glass Co. v. Kerlin Bros. Co., 122 Fed. 414, there was a contract for the delivery of 6 miles of first-class, second-hand 6 inch pipe, which would pass inspection, etc. The court said:

"There is nothing in the correspondence from which it could be inferred that the quantity of 6 miles was not material and determinative and when the plaintiff sold that definite quantity out of more than 9 miles, it had offered, it was bound to deliver it. If the plaintiff desired to contract only for such pipe as the defendant might select out of the quantity it had on hand at the places designated in its letter, it should have made its offer accordingly; but when it agreed to sell and deliver 6 miles upon the terms stated, it could not fulfill its obligation by delivering a less number of feet."

The rule laid down in Brawley v. U. S., supra, is then quoted and the cases of Norrington v. Wright, supra, and U. S. v. Pine River Logging Co., 89 Fed., 907, cited.

On the question of tender of a less quantity contracted for not being sufficient, see also:

Newell v. New Holstein Canning Co. (Wisc.) 97 N. W., p. 486.

Kalamazoo Corset Co. v. Simon, 129 Fed. p 144.

In the case of Inman et al v. Elk Cotton Mills, 92 S. W. p. 760, the order was for 50 bales of cotton at a specified price, but the plaintiff only tendered a delivery of 49 bales. The court said:

> "A delivery of a less number was not a compliance with this contract. So far as it affected the relations of the parties, a failure in the matter of 1 bale was as much as a failure to deliver any greater number of bales. The complainants sued to recover for the breach of an entire contract and in order to maintain their bill they must show a compliance or willingness to comply with it as an entirety. Failing in this latter regard, they fail altogether."

Citing Tiedeman on Sales, Sec. 101.

Furthermore, in that case the defendant had repudiated the contract but the plaintiff refused to accept the repudiation, and therefore the court said, that under the general rule, the contract was kept alive for the benefit of both parties.

On this subject the rule is laid down in 9 Cyc., p. 637:

> "If a promisee elects not to accept the renunciation and continues to insist upon the performance of the promise, as he may do, the contract remains in existence for the benefit and at the risk of both parties, and if anything occurs to discharge it from other causes, the promisor may take advantage of such discharge."
> Citing many authorities.

With reference to this latter point, see also the leading case of Roehm v. Horst, 178 U. S., p. 1; 44 Law Ed. p. 953.

In the case of Sherman Oil & Cotton Co. v. Dallas Oil & Refining Co., 77 S. W., p. 960, there was an order for 5 tanks of crude oil at 20 cents per gallon at 7½# f. o. b. the mill at Dallas, buyer's tanks, October shipment, tanks to contain about 135 barrels. It was held that the statement of 135 barrels was material, and that a delivery of 125 barrels to the tank, was not a compliance with the order.

See also Boyd v. Second Hand Supply Co. (Ariz.) 1912, 123 Pac. 619.

In the case of Hills vs. Edmund Co., 110 Pac., 1088, there was a contract for the sale of 20 cars of fruit and only 9 were delivered. The court quoted with approval, the case of Brawley v. U. S., supra, and also quoted from the case of Polhemus v. Heiman, 45 Cal., 577, where it was said:

> "If the vendor delivers a less quantity of goods than he contracted to deliver, the vendee is at liberty to refuse to accept, and if he accepts a part he may return that and refuse to accept less than the whole, but having received and retained a part, he cannot refuse to pay for the part received."

In Barton v. Kane (Wisc.) 84 Am. Dec., p. 728-730, the order was for 5,000 cigars and the plaintiff sent 5,625. The court held that this was not a sufficient delivery, and that:

> "To constitute a delivery to the carrier, a delivery to the consignee, so as to pass the title and make the consignee liable for goods sold and deliverd, the goods must correspond in quantity as well as quality, with those named in the order."

See also Dabovich v. Emeric, 12 Cal., p. 180.

In the case of Filley v. Pope, 115 U. S., p. 213; 29 Law Ed., 372, the order was for 500 tons of No. 1 Scotch Pig Iron at $26 per ton, shipment from Glasgow as soon as possible. The defense was that the plaintiffs failed to ship the iron from Glasgow as soon as possible. The testimony showed that the plaintiffs bought the iron from a party in Glasgow and requested him to ship it to New Orleans. The iron was then at the factory equi-distant and equally accessible by railway from the ports of Glasgow on the west coast and Leith on the east coast, and such iron was sometimes shipped from Glasgow and sometimes from Leith. No vessel could be obtained from Glasgow to New Orleans, for some consider-

able time, and the iron was shipped from the port of Leith. The lower court held that the place of shipment was not material; but the Supreme Court overruled this contention upon the strength of the case of Norrington v. Wright, which case was followed and quoted from with approval.

The court said, after stating the contract:

> "The court has neither the means nor the right to determine why the parties in their contract specified shipment from Glasgow instead of using the more general phrase, 'shipment from Scotland,' or merely 'shipment' without naming any place; but it is bound to give effect to the terms which the parties have chosen for themselves. The term 'shipment from Glasgow' defines an act to be done by the sellers at the outset and a condition precedent to any liability of the buyer."

So also in the case of Pope v. Allis, 29 Law Ed., p. 393. There was a contract for the sale of 500 tons of No. 1 Extra American and 300 tons of No. 1 Extra Scotch Pig Iron. Before its arrival the plaintiff had paid for the iron and also the freight, but when the iron arrived the plaintiff refused to accept the same on account of deficiency in quality, and sued the defendant for the money paid him, including freight. The defendant contended that upon breach of warranty of quality, the plaintiff cannot, in the absence of fraud, rescind the contract of purchaser and recover the price.

The court said:

> "It did not appear that at the date of the contract the iron had been manufactured and it was shown by the record that no particular iron was segregated and appropriated to the contract by the plaintiffs in error, until a short time before its shipment. The defendant had no oportunity to inspect it until it arrived in Milwaukee, and consequently never accepted the particular iron appropriated to fill the contract. . * * * * When the subject matter of a sale is not in existence or not ascertained at the time of the contract, an undertaking that it shall when existing or ascertained, possess certain qualities, is not a mere warranty but a condition, the performance of which is precedent to any obligation upon the vendee under the contract; because the existence of those qualities being part of the description of the thing sold, becomes essential to its identity and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted."

Citing a large number of cases. The court then quotes from the case of Norrington v. Wright, which is approved.

The case of Patrick v. Norfolk Lbr. Co. et al, a Nebraska case decided in the year 1908, and found in 115 N. W., p. 780, is squarely in point. In that case a written order for a carload of posts was given, the order calling for 7 different sizes of posts. There was a deficiency in the dimensions of the posts and in the number thereof, and it was argued that this amounted to an express warranty that the posts would be of the length and dimensions ordered. The court said:

"The record is barren of proof of an express warranty. The fact that the order was for a carload of posts of certain dimensions and that plaintiff undertook to fill that order, did not create a warranty by plaintiff that the posts would be in number and dimensions to correspond with the direction. But it was a condition precedent to defendant's obligation to receive and pay for the posts, that their size and number equalled his order. As said by Mr. Justice O'Brien in Carlton v. Lombard, 149 N. Y., p. 137; 43 N. E., p. 422; and quoted with approval by Mr. Justice Bartlett in Waeber v. Talbott, 167 N. Y. p. 48; 60 N. E. 288; 82 Am. St. Rep. 712-717:

> 'That words of description are not considered as a warranty at all; but conditions precedent to any obligation on the part of the vendee, since the existence of the qualities indicated by the descriptive words being part of the description of the things sold, become essential to its identity, and the vendee cannot be obligated to receive and pay for a thing different from that for which he contracted. * * * The tendency of the recent decisions in this court, is to treat such words as part of the contract of sale, descriptive of the article sold and to be delivered in the future, and not as constituting that collateral obligation which sometimes accompanies a contract of sale and known as a warranty.'

We do not say defendants were under any obligation to accept the carload of posts, and as the deficiency in the number and size of the posts was not patent without unloading the car, they doubtless had the right, in the absence of an invoice demonstrating the carload was not up to their order, to take the posts from the car and count and inspect them, and upon learning

> the deviation from the order, had the right to refuse to accept the posts, and in that event should promptly notify plaintiff, or they could waive the difference between what they bought and the timber sent them."

The court held, however, that the plaintiff could recover for the reason that the defendant had, after inspection of the carload, received the same, taken the posts to his yard, and for a period of 50 days sold from the quantity received.

In the case of Wiburg et al v. Walling & Co., 113 S. W., p. 832, (Ken. 1908,) certain lumber was sold according to certain dimensions and subject to the following conditions imposed by the seller:

"We ship on our own inspection and measurement."

In a suit for the price, the defendants contended that the lumber shipped did not conform to the kind, description and quality specified in the contract. The court said, that—

> "The defendant was not obliged to accept lumber of any other quality, kind or description than that specified in the contract; and that if the lumber delivered to them did not comply with the contract, they rejected, as they had a right to do, the whole of it, and the petition should have been dismissed. As a legal proposition it is well settled that when a person contracts for the delivery to him of goods or property of a certain quality and description, he may refuse to accept any part of the property or goods received unless all of them are in accordance with the contract. We shall also say, that in

> a case like this, where lumber in carload lots was ordered and delivered, that the purchaser could not be held to have accepted it or waived his right to reject it, merely because he took it out of the cars for the purpose of inspection, as it could not be inspected without being removed from the cars and each piece of lumber examined."

Citing a large number of cases.

The court held, however, that inasmuch as the terms of sale were subject to the inspection of the seller and the seller had inspected the same and found the lumber to be of the quality and kind ordered, and no bad faith or fraud being shown, and defendant's own witnesses only claiming a deficiency to the extent of $180, the lumber was of the kind and quality ordered.

See also the case of Springfield Shingle Co. v. Edgecomb Mill Co., 52 Wash. 620; 101 Pac. 233; 35 L. R. A. (N. S.), p. 258, and extensive note to said case, particularly IV-"A" and V.

In that case, shingles were sold as Extra "A" Star Red Cedar Shingles. The court held that this description implies a contract that the shingles shall be of a quality which that brand implies. The court held that it was a condition precedent to the recovery of the price on the part of the plaintiff, to prove that he had delivered shingles of that brand and quality, and that such condition precedent should not be confounded with a warranty. The court also held that the tender of an article answering the description,

is a condition precedent to recovery, and if this condition be not performed the vendee is entitled to reject the article, or if he has paid for it, to recover back his money.

Applying the principles above announced to the case at bar, and conceding, as we must, that the testimony of plaintiff in error, on the question of length, is the uncontradicted testimony in the case, it seems to us conclusive that defendants in error have not complied with their contract and that plaintiff in error had the right to reject the goods in their entirety and defeat the action for their price. It was error for the trial court to refuse the motion for a directed verdict.

But assuming, for the sake of the argument, that the question of the performance of the contract on the part of defendants in error, was a proper question for the jury to determine, we submit that the question should have been submitted to the jury under proper instructions. This subject will be discussed under the next heading.

2.

THE COURT ERRED IN REFUSING TO GIVE INSTRUCTIONS NUMBERED 3 AND 6, REQUESTED BY PLAINTIFF IN ERROR.

Plaintiff in error duly requested the trial court to give its Instruction No. 3, reading as follows, to-wit: (R. p-86.)

"INSTRUCTION NO. 3

If you find that the defendant ordered the goods, wares and merchandise sued on and gave the order as contended for by the plaintiffs, and said order was not procured through fraud, as alleged by the defendant, and you find that the person who signed said order on behalf of the defendant company, to-wit; J. C. Shaw, had authority or apparent authority, as will hereafter be explained, to order said goods on behalf of the defendant company, and if you find further that the plaintiffs delivered or tendered a delivery of the steel called for by the contract, to the defendant at Hoquiam, Washington, and the defendant wrongfully refused payment therefor, then you will find for the plaintiffs for the amount agreed to be paid for said goods, as provided for in said order, with interest. In determining the fact, whether or not the plaintiffs have complied with their contract in delivering or tendering delivery to the defendant of the steel ordered, if you find it was ordered, I instruct you that to constitute a good delivery in law, so as to make the defendant liable for said steel, the same must correspond in quantity and in kind and description with that named in the order. The defendant was not obliged to accept any less or any greater number of bars of steel than ordered, nor was the defendant obliged to accept bars of steel of any less or greater length than ordered, and if the steel, or any part thereof delivered or tendered to the said defendant, did not comply with the contract in this, to-wit: that said bars of steel were less or greater in number than shown on the order sued on, or said bars of steel, or some thereof, were not of the length specified in the order, but were of a greater or less length, then the defendant had a right to reject the whole of said order so delivered or tendered, because the failure of the seller, the

> plaintiffs in this case, to deliver the quantity specified, or to deliver steel of the length specified, constituted a total breach of the contract. The plaintiffs in this case were bound to tender or deliver the number of bars of steel called for, and were bound to tender bars of steel of the length called for, and if you find that the plaintiffs did not deliver or tender delivery of the number of bars of steel specified in the order, or the bars delivered or tendered were of greater or less length than twenty feet cut in two, then you will find your verdict for the defendant."

The plaintiff in error also requested the trial court to give Instruction No. 6, which is substantially the same instruction as Instruction No. 3, with some minor changes. The court refused to give either of these instructions, and exceptions to the court's refusal to so instruct were duly taken and allowed, before the jury retired. (R. p. 85.)

The court did, however, give the first portion of Instruction No. 3, concluding with the words:

> "I instruct you that to constitute a good delivery in law, so as to make the defendant liable for said steel, the same must correspond in quantity and in kind and description with that named in the order."

This is the only light that the jury was given on this most important question. It was merely a statement of a general rule of law, without any application to the particular facts of the case. The instruction given was entirely too general and did not inform the jury whether a strict or a substantial compliance of this contract on the part of defendants in error, was

necessary. We submit that if the jury had consisted of twelve lawyers of average ability, they would not have agreed as to the proper construction of this instruction with reference to the particular facts of the case. Either Instruction No. 3, or Instruction No. 6, or the substance of either one of these instructions, should have been given to the jury by the trial court, and it was error not to do so. Our position is emphasized by the fact, that after the court had instructed the jury, a juror asked the following question:

"Q. I would like to ask about the weight. I am a little mixed on that, as to the shipment of the order."

The court answered:

> "You are the sole judges of the facts and the evidence, and a great part of it is written and part of it has gone in by word of mouth and you will have to settle that by yourselves." (R. p. 85.)

It was very evident why the juror was confused. The only evidence in the case, with reference to the length of the bars shipped, was the evidence of witnesses produced by plaintiff in error, and this testimony showed that the lengths of practically all the bars were in excess of the lengths specified in the order, and the summary introduced in evidence as Exhibit "G", showed a total overweight on the excess lengths, of 2,709 pounds. The juror, having this in mind, was in doubt as to the law on this proposition.

Had the court properly instructed the jury on the subject, and had the court given Instruction No. 3 requested by plaintiff in error, the jury would have fully understood the situation and would not have been confused. The court erred, therefore, in not giving the instructions requested, or the substance thereof.

Rush vs. Spokane Falls & North Co., 23 Wash., 501-511.

Zolawenski vs. Aberdeen, 72 Wash., 95-97.

Howe vs. West Seattle Land Co., 21 Wash., 594-600.

Lownsdale vs. Grays Harbor Boom Co., 21 Wash., 542-547.

Murphy vs. Chicago, Milwaukee etc. Ry. Co., 66 Wash., 663-669.

Duggan vs. Pacific Boom Co., 6 Wash., 593-596.

Enoch vs. Spokane Falls Ry. Co., 6 Wash. 393-399.

Wilson vs. Waldron, 12 Wash., 149-150.

The trial court having committed error in refusing to grant plaintiff in error's motion for a directed verdict, and in refusing to properly instruct the jury on the question of the performance of the contract, should have set aside the verdict and the judgment

and granted plaintiff in error's motion for a new trial.

We respectfully submit that the cause should be reversed and dismissed, or a new trial granted.

Respectfully Sumbitted,

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